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No. 970

In the

Supreme Court of the United States

THE HONORABLE ERNEST GUINN,
United States District Judge,
VICTOR HECHT AND HECHT VALVE COMPANY,
Petitioners,

v.

ACF INDUSTRIES, INCORPORATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN J. WATTS,
P. O. Box 1031,
Odessa, Texas,

C. E. KEYS,
P. O. Box 1378,
Monahans, Texas,

and

JOHN G. PATTERSON,
711 Fannin Street,
Houston, Texas,
Attorneys for Petitioners.

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To the Honorable Mr. Justice Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Victor Hecht and the Hecht Valve Company, Petitioners herein, pray that a Writ of Certiorari issue to review the action and the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 6th day of September, 1967. Petition for rehearing was denied on October 9, 1967.

I.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is printed in Appendix "A" hereto and has not yet been reported.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1967. Rehearing was denied on October 9, 1967. The jurisdiction of this Court is invoked under Article 28, U.S.C., Sec. 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in its opinion holding that even though the Court should discern some grounds for the trial court's decision that the decision here must depend on whether those grounds outweigh the undesirability of setting aside the decision of another district judge and upon such a ground issue a mandamus against the Respondent, The Honorable Ernest Guinn and such a statement of law is clearly erroneous in a case where the Judge who rendered the original opinion assigned the case to Judge Guinn for hearing and action thereon after a new motion was filed.

2. Whether the Court of Appeals erred in holding that in spite of the Title 35, U.S.C.A, 281 and Title 28, Sec. 1400 (a) and (b) giving the Petitioners the right to bring this

suit in the United States District Court for the Western District of Texas that the Court by a stay order could render null and void said statutes and deprive the Petitioners of their rights under its plain and unambiguous terms.

3. Whether the Court erred in holding that the United States District Court of Kansas had jurisdiction even though jurisdiction first attached in a prior suit filed in the United States District Court for the Western District of Texas where the suit was first commenced and jurisdiction was first obtained.

4. Whether the Court of Appeals erred in holding that the Respondents by filing a declaratory judgment act in Kansas after the United States District Court of the Western District of Texas has acquired jurisdiction can stretch the declaratory judgment act to such an extent as to give the Respondents the paramount right to choose the forum for trying out questions of forum and validity.

5. Whether the Court of Appeals erred in holding that a writ of mandamus was available to set aside the order of Judge Guinn setting aside the prior stay order by a writ of mandamus.

6. Whether the Court of Appeals erred in holding that a compulsory counter claim was not required to be filed by the Petitioner in the United States District Court for the Western District of Texas.

7. Whether the Court of Appeals erred in holding that there had not been a change in circumstances since the original decision by Judge Suttle.

8. Whether the Court of Appeals can overrule the opinion of the Supreme Court of the United States in *Hoffman v. Blaski*, 4 L. Ed. 2d 1254, by holding that a stay order could be granted that Judge Suttle might transfer the cause to Kansas even though such transfer could not have been made under applicable statutes with reference to forum non conveniens.

9. Whether the Court of Appeals erred in overruling the many decisions of the Fifth Circuit and of other circuits holding that the Court first acquiring jurisdiction of a controversy should be allowed to proceed without interference of other courts in suits subsequently instituted.

10. Whether the Court of Appeals was correct in holding that in this type of case the Trial Court had no discretionary power to determine whether venue had been established under United States Statutes giving the Court this power.

11. Whether the Court of Appeals can by a writ of mandamus deny the trial court the right of passing upon the plea of forum non conveniens.

12. Whether the Court of Appeals can hold that the plea of forum non conveniens of Respondent ultimately filed after a period of one year had passed and after other remedies proved unavailable had not been waived.

13. Whether the Court of Appeals under any circumstances is justified in issuing the writ of mandamus against the Trial Court who had discretion to determine this cause in a case where the remedy of Respondent was adequate.

14. Whether the extraordinary and harsh writ of mandamus can be issued by the Court of Appeals in order to determine matters such as venue, forum non conveniens that are clearly within the discretionary power of the Trial Court.

15. Whether the Court of Appeals erred in holding that a Trial Court had the power to consider the question of forum non conveniens and to enter a stay order after the jurisdiction of the El Paso Court had attached and a hearing had upon the question of venue and forum non conveniens.

16. Whether a Court of Appeals can give to a Federal Court limitless powers when under Rule 82, F.R.C.P. Federal Courts are courts of limited power except those afforded by statute.

17. Whether the Court of Appeals is justified in violating the plain mandate of the United States Supreme Court with reference to the type of matters here involved as set forth by the Supreme Court in *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952) and thus substitute their own findings in violation of the rules laid down by the Supreme Court of the United States by virtue of issuance of writ of mandamus against the Honorable Ernest Guinn, United States District Judge in and for the Western District of Texas.

18. Whether the Kansas District Court to whom jurisdiction has been in effect transferred by the entry of the original stay order has venue of a patent action which is a statutory proceeding.

IV.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 35, U.S.C.A. 281, which provides in part, as follows: "A patentee shall have remedy by civil action by infringement of his patent".

It is further provided in *Title 28, Sec. 1400 (a) and (b)* as follows:

> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

The requirements as to venue are set out in Title 28, U.S.C., Sec. 1400 (b) as follows:

> "(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Rule 13 (a), F.R.C.P. dealing with compulsory counterclaims reads as follows:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, effective March 19, 1948."

28 U.S.C.A. Sec. 1404(a):

> §1404. Change of venue
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Rule 82, F.R.C.P. entitled "Jurisdiction and Venue Unaffected" reads as follows:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. As amended Dec. 29, 1948, effective Oct. 20, 1949."

V.

STATEMENT

This litigation involves U. S. patent No. 3,054,594 issued to Victor Hecht for an alleged invention in a carburetor valve, the valve having a resilient or rubber seat. The Hecht Valve Company, Inc. is the exclusive licensee under this patent. ACF Industries, Incorporated is accused of manufacturing and selling a carburetor valve which infringes this patent. Chrysler Corporation and General Motors Corporation are customers of ACF Industries and are accused of infringement by virtue of their use and resale of carburetor valves purchased from ACF Industries.

On June 18, 1964, Victor Hecht filed an action in the United States District Court for the Western District of Texas against ACF Industries and its two customers alleging infringement of patent No. 3,054,594.

Eleven days later, on June 29, 1964, ACF Industries filed an action in the District of Kansas against Victor Hecht and his exclusive licensee, The Hecht Valve Company, Inc.,

seeking a declaratory judgment that patent No. 3,054,594 is invalid and not infringed, and an injunction restraining Victory Hecht and The Hecht Valve Company from bringing or threatening to bring other infringement actions against ACF Industries' customers.

Before answering the complaint in the action pending in the Western District of Texas, ACF Industries filed a Motion to Dismiss For Lack of Venue.

After the case had been pending for nearly one year and after the Respondent became convinced that we could have venue by taking of depositions on the part of petitioners over different sections of Texas a Motion for Forum Non Conveniens was then filed by ACF Industries, the latter motion seeking a stay of that action pending final judgment in the action pending in the District of Kansas or, in the alternative, a transfer of that action to the Eastern District of Missouri under 28 U.S.C., Sec. 1404 (a).

The two motions for hearing as to venue and forum non conveniens was brought before The Honorable Dorwin W. Suttle, United States District Judge for the Western District of Texas. The hearing before Judge Suttle commenced on September 13, 1965, and extended through September 15, 1965. In addition to the affidavits before the Court and the depositions that were introduced in evidence, eight witnesses testified at this hearing. Among the witnesses so testifying were Victor Hecht (Plaintiff below), Clarence E. Keys (one of Hecht's attorneys of record, from Monahans, Texas) and Charles E. Arnold (a pretrial investigator for

Hecht's other attorney of record, John J. Watts of Odessa, Texas).

At the conclusion of the three-day hearing the Court entered a stay order staying the prosecution of the suits against the three defendants in El Paso pending the determination of a declaratory judgment action that was brought after the jurisdiction of the United States District Court of Texas had attached.

It was quite apparent that Judge Suttle attempted to transfer the case under the doctrine of forum non conveniens by the entry of a stay order since a motion for forum non conveniens would not lie under the statute since the suit could not be originally brought in Kansas.

On January 12, 1966, Victor Hecht filed a motion to vacate the Stay Order of September 16, 1965, alleging a change in circumstances since the entry of that order.

On January 25, 1966, Judge Suttle heard this motion and found that there had been no change in circumstances which would cause him to vacate that Stay Order.

On July 29, 1966, The Honorable Ernest Guinn took the oath of office as United States District Judge for the Western District of Texas.

On August 13, 1966, while Judge Suttle was on vacation, Hecht presented an ex parte motion to newly appointed Judge Guinn, which motion sought to set aside the Stay Order entered almost one year earlier on September 16, 1965, by Judge Suttle. Judge Guinn did not grant this motion, but he did issue an Order to Show Cause why Hecht's motion should not be granted.

In the meantime the Courts had entered into an assignment of the docket agreement under which Judge Guinn would hear the civil cases pending before the El Paso Court which would, of course, include the case at bar and Judge Suttle would take up the criminal cases for the Western District of Texas.

Thereafter, on November 21, 1966, a hearing on the Order to Show Cause was held before Judge Guinn. No witnesses testified nor were any affidavits or depositions introduced in evidence at this hearing.

The record is quite voluminous on oral argument and both sides conceded that depositions had been taken all over the United States at great expense to the parties that could be used in either the trial in Texas or the trial in Kansas.

The argument of counsel will show that it was in effect stipulated that the discovery had been completed and that these depositions could be used regardless of whether the case was tried in Kansas or in Texas.

Judge Guinn stated four times during the arguments that he would consult with Judge Suttle concerning the matter prior to entering his final decision.

On December 16, 1966, Judge Guinn entered an order without opinion summarily setting aside Judge Suttle's Stay Order of September 16, 1965, overruling ACF Industries' *Forum Non Conveniens* Motion and overruling ACF Industries' Motion to Dismiss for Lack of Venue.

The reasons given for Judge Guinn's vacation of the stay order were in effect that he felt the Western District of

Texas was the only court that had jurisdiction since suit was first commenced there and that it was the duty of the court to rule; that the Motion for Forum Non Conveniens due to the fact that depositions had been taken all over the United States made it about as convenient to try the case in one court as in another insofar as the issue of forum non conveniens as to this patent infringement action was concerned and after full argument of all counsel, including counsel for Chrysler and General Motors, the Court set aside Judge Suttle's stay order September 16, 1965, overruled ACF's forum non conveniens motion and overruled ACF's motion for lack of venue.

This was the first time that the motion for forum non conveniens had been ruled on by any court or the motion to dismiss for lack of venue since Judge Suttle reserved his decision on these two motions pending the action of the Kansas Court in the declaratory judgment action.

Judge Guinn exercised his discretion in refusing to certify the question under 28 U.S.C.A. Sec. 1292(b) so as to permit an interlocutory appeal.

Even though it has been contended throughout by the petitioner ACF that there was a difference of opinion of the two judges of the same Court as to the proper place of trial there is nowhere any evidence that after the change of conditions had taken place, to-wit, the taking of depositions over many areas of the United States that could be read by both parties where the case was tried the judges were in difference of opinion as to the correctness of Judge Guinn's order and certainly under any theory the

plea had been waived by the respondent. Likewise, the question of determining whether there had been a change of circumstances since Judge Suttle entered the stay order was a power clearly within Judge Guinn's discretion. Judge Suttle could not by way of a stay order transfer this case to a court in which suit could not originally have been brought, Title 28 Sec. 1404(a) controls venue under these circumstances where the suit had been first filed in Texas.

If this Decision stands we might as well abolish our lower courts and get quick findings on venue and transfer and Jurisdiction by the quick use of the Writ of Mandamus in the Appellate Court.

The Circuit Court of Appeals *assumed that this amounted to the action of one court setting aside the judgment of another.*

ACF thereafter filed a Petition for Writ of Mandamus which was granted by the Fifth Circuit. The issue of whether the Fifth Circuit was correct in issuing this mandamus against Judge Guinn under the above circumstances is the prime issue before this Honorable Court.

VI.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is not in accord with applicable decisions of this the Supreme Court of the United States.

The holdings complained of in the preceding statement and the questions raised are in direct conflict with all statutory patent law and all rules and cases dealing with venue

and the doctrine of forum non conveniens and the applicable federal statutes heretofore quoted that are involved herein.

It would seem that the Supreme Court of the United States would expect litigants in the lower courts to follow their decisions involving these kind of matters and hence, it is imperative in order for this court to enforce its own decision in *Hoffman v. Blaski*, 4 L. Ed. 2d 1254 and *Kerotest Mfg. Co. v. C-O-Two Co.*; 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952) for this court to grant the writ of certiorari and hold that the 5th Circuit erred in issuing the writ of mandamus.

In addition thereto the writ of mandamus insofar as we have been able to find has never been issued in this kind of case where the appeal or remedy at law was adequate on behalf of Respondent.

The Fifth Circuit has apparently decided this case not only on distorted conception of the law but they have also decided the case on facts that are contrary to the allegations made by Petitioners in their petition for writ of mandamus. We would like to point this out as follows.

The Petitioner ACF admitted before the Fifth Circuit that on August 13, 1966, while Judge Suttle was on vacation Hecht presented an exparte motion to the newly appointed Judge Guinn, which motion sought to set aside the stay order entered almost one year earlier by Judge Suttle (R. 651-62). The Petitioner admits on page 35 in the Petition for Mandamus that Judge Guinn did not grant this motion, but he did issue on August 13, 1966, an order to

show cause why Hecht's motion should not be granted (R. 663).

The petitioner ACF before the Fifth Circuit alleged in its Petition for Mandamus on page 35, as follows: "When Judge Suttle returned from vacation, *he resumed his role in the Texas action and considered Hecht's motion to set aside the Stay Order* of September 16, 1965 (R. 664, 678). "Petitioner further admits on page 35 of its Petition for Writ of Mandamus as follows: "On October 7, 1966, an order was filed in the Texas court whereby the Civil and Criminal Dockets in the El Paso Division of that Court were divided between Judge Guinn and Judge Suttle (R. 679). The Civil Docket was assigned to Judge Guinn and the Criminal Docket was assigned to Judge Suttle. This order also contained the following provisions:

> 'It is provided, however, that nothing herein shall be construed as prohibiting the Judges *from assisting one another with such foregoing assignment in any manner they may see fit.* The disqualification of any Judge in any case assigned to him shall automatically assign such case to the one not disqualified immediately upon certification of disqualification by such Judge.'" *This order clearly placed the vacation of this stay order within Judge Guinn's discretion.*

The Petitioner ACF before the Fifth Circuit further admits on page 37 of its Petition for Mandamus as follows: "On four separate occasions during the course of this hearing, Judge Guinn expressed his intention to have a full discussion with Judge Suttle before ruling on Hecht's motion to vacate Judge Suttle's Stay Order of September 16, 1965 (R. 698, 706, 716-7 and 750)."

We would call the Court's attention to the fact that the hearing before Judge Guinn was not held until November 16, 1966 after Petitioner has admitted as heretofore set out that Judge Suttle *considered this very motion and after Judge Suttle's failure to overrule same, Judge Suttle then assigned same to Judge Guinn for hearing.*

Petitioner Hecht respectfully submits that there is no basis under the above record for holding that one judge has overruled another, since Judge Suttle under the admissions of Petitioner considered the motion to set aside said stay order of September 16, 1965 and thought it of sufficient merit that he assigned same to Judge Guinn under their division of the docket agreement for rehearing.

The opinion of the Fifth Circuit to the effect that Judge Guinn has overruled Judge Suttle as to this Motion for Rehearing is not based on anything except the argument set forth in the Petitioner, ACF's Application before that Court and the inferences that have been drawn by the Petitioner, ACF.

It is clear that the Fifth Circuit has drawn an improper inference from the facts in taking the view that Judge Guinn has overruled Judge Suttle without the consent and agreement of Judge Suttle.

We are therefore confronted with not only an erroneous holding of law in a number of vital respects to the jurisdiction of the courts and a clear failure to follow the mandates of this Court but the Fifth Circuit has acted upon this case in the assumption of facts not supported by the record in the case.

The Petitioner Hecht has contended throughout that the Federal Court first acquiring jurisdiction of the subject matter is entitled to proceed to final judgment on all issues. There can be no real dispute but that the United States District Court for the Western District of Texas first acquired jurisdiction of this cause.

The Fifth Circuit who was reversed by this Honorable Court in the decision, *Hoffman v. Blaski*, 4 L. Ed. 2d 1254, has attempted to dodge the impact of the Blaski opinion by quoting a footnote on page 7 of its opinion as follows, and this Honorable Court has determined this case adversely to Respondent, ACF's contention.

> "Since a transfer is not requested, we need not determine if the Texas suit might have been brought in the Kansas court. See *Hoffman* v. Blaski, (1960), 363 U.S. 335."

This is really ingenious. The Fifth Circuit now tries to get as the law the very law with reference to interest of justice and convenience of the parties that they attempted to declare in *Blaski* supra. This Court repudiates this doctrine in *Blaski* and the Fifth Circuit now tries to come in by the back door by virtue *of a stay order. Stay orders cannot circumvent the statutes relative to venue and the convenient forum as was clearly ruled upon by this Court in Blaski, supra.*

It is quite apparent that the Fifth Circuit has not only overruled the *Blaski and Kerotest*, supra cases, but have denied to Petitioners here the protection of the United States Statutes and rules heretofore quoted.

As a matter of fact if the decision of the Fifth Circuit stands in this case the Federal Courts will become courts of limitless jurisdiction and what the Fifth Circuit tried to do in *Blaski* will become the law and the Federal statutes with reference to venue and transfer will be completely nullified.

It is quite evident that there are no provisions under the statutory law giving jurisdiction to the United States District Court of Kansas to try the patent infringement case involved herein and hence, even though that court might be a court of general jurisdiction and patent jurisdiction as to some cases it was not under *Blaski and Kerotest*, supra, as to the petitioners herein.

The cases relied upon by the Respondent ACF, petitioner in the Court below, are not in point since they have been overruled by the *Blaski case*, supra, by this Court, 4 L. Ed. 1254. In this case this Court said as follows:

> "Blaski and others, residents of Illinois, brought this patent infringement action in the United States District Court for the Northern District of Texas against one Howell and a Texas corporation controlled by him, alleging that the defendants are residents of, and maintain their only place of business in the City of Dallas in the Northern District of Texas, where they are infringing respondents' patents. After being served with process and filing their answer, the defendants moved, under §1404(a), to transfer the action to the United States District Court for the Northern District of Illinois. 363 U.S. 337. Respondents objected to the transfer on the ground that, inasmuch as the defendants did not reside, maintain a place of business, or infringe the patents in and could not have been served with process in, the Illinois district, the courts of that

district lacked venue over the action and ability to command jurisdiction over the defendants; *that therefore that district was not a forum in which the respondents had a right to bring the action, and, hence, the court was without power to transfer it to that district.*"

The Court further said:

> "*Petitioners' 'thesis' and sole claim is that §1404(a), being remedial, Ex parte Collett,* 337 U.S. 55, 71, 93 L. Ed. 1207, 1216, 69 S. Ct. 944, 959, 10 A.L.R. 2d 921, should be broadly *construed and, when so construed, the phrase 'where it might have been brought' should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer;* and that *'if at such time the transferee forum has the power to adjudicate the issues of the action,* it is a forum in which the action *might then* have been brought.'" (Emphasis added)

The Court further said:

> "We do not agree. We do not think the §1404 (a) phrase *'where it might have been brought' can be interpreted to mean,* as petitioners' theory would require, 'where it may not be rebrought, with defendants' consent.' This Court has said, in a different context, that §1404 (a) is 'unambiguous, direct (and) clear,' Ex parte Collett, 337 U.S., at 58, and that 'the unequivocal words of §1404 (a) and the legislative history * * * establish that Congress indeed meant what it said.' United States v. National City Lines, Inc., 337 U.S. 78, 84, 93 L. Ed. 1226, 1230, 69 S. Ct. 955, 959. Like the Seventh Circuit, 260 F. 2d, at 322, we think the dissenting opinion of Judges Hastie and McLaughlin in Paramount Pictures, Inc. v. Rodney, 186 F. 2d 111 (C.A. 3d Cir.), correctly answered this contention:
>
> > *'But we do not see how the conduct of a defendant after suit has been instituted can add to the formus where "it might have been brought."* In the normal meaning of words this language of §1404(a) directs the attention of the judge who

is considering a transfer to the situation which existed when suit was instituted.'

"It is not to be doubted that the transferee courts, like every other District Court, had jurisdiction to entertain actions of the character involved, but it obvious that they *did not acquire jurisdiction over these particular actions when they were brought in the transferor courts.* The transferee courts could have acquired jurisdiction over these actions *only if properly brought in those courts,* or if validly transferred thereto under § 1404 (a). Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U.S. 177, 179, 180, 73 L. Ed. 252, 254, 49 S. Ct. 98; Neirbo Co. v. Bethleham Shipbuilding Corp. 308 U.S. 165, 84 L. Ed. 167, 60 S. Ct. 153, 128 A.L.R. 1437. *But the power of a District Court under § 1404 (a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant, but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff.*"

The Court further said:

"In any event, the conflict between the Circuits is now resolved, and what happened here *will not happen again.*"

These important decisions by the Supreme Court speak for themselves so as to show that the cases relied upon by the Respondent are not in point and even if in point, have been overruled and that Petitioner Hecht is entitled to certiorari.

The law dealing with this fact situation was further made quite clear by a Circuit Court construing the holding of

this Court *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952) in *Sunstrand Corp. v. American Brake Shoe Company*, 315 F. 2d 273, in which the Court in discussing the Kerotest case said:

> "The United States Supreme Court in Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952), laid down guidelines for the lower courts in handling the complex multiple suit, multiple party, and forum non conveniens problems that arise in patent actions. While the Supreme Court therein established a broad area of discretion in the District Courts to enable them to properly regulate the course of complicated litigation in these area, nowhere in the opinion can we find authority for the action of the Illinois District Court in the instant case.

In Kerotest:

> "In Kerotest the patent owner filed an action for infringement against a customer of the manufacturer alleged to be infringing. This action was started in Illinois. By amendment the manufacturer was added as a defendant, but prior to the amendment the manufacturer had instituted a Declaratory Judgments Act suit against the patentee in Delaware. The District Court in Delaware enjoined the patentee from proceeding in the Illinois suit against the manufacturer and refused to stay the Delaware action. The Court of Appeals for the Third Circuit reversed and the Supreme Court affirmed.
>
> "While the fact situations in Kerotest and the instant case are not exactly parallel, *it is to be noted that in Kerotest, the final disposition permitted the first filed suit to proceed.* Moreover, in each of the cases, referred to by the Court in its footnote (fn. 3 at 184, 72 S. Ct. at 221) *it was the prosecution of a subsequently filed suit that was sought to be enjoined or stayed.*

As to the problem which faced the trial judge in the case at bar, we believe the Supreme Court's language in Kerotest is significant:

> *'The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity.* He is given an equal start in the race to the courthouse, not a headstart. *If he is forehanded subsequent suits against him* by the patentee can within the trial court's discretion be enjoined pending determination of the declaratory judgment suit, and a judgment in his favor bars suits against his customers. If he is anticipated, the court's discretion is broad enough to protect him from harassment of his customers. If the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere. And if the manufacturer is joined as an unwilling defendant in a forum non conveniens, he has available upon an appropriate showing the relief provided by Sec. 1404 (a) of the Judiciary Code. 62 Stat. 869, 937, 28 U.S.C. Sec. 1404 (a).'

"The Supreme Court recognized the right of a litigant to initially choose his forum—even where this involves a 'race to the courthouse.' American Brake Shoe had a statutory right for which it sought vindication in the Maryland court. Its right was separate and independent from that against the alleged infringing manufacturer, and such right, sanctioned by statute, ought not be interfered with except for compelling reasons. 35 U.S.C. Sections 271, 281; Birdsell v. Shaliol, 112 U.S. 485, 488, 5 S. Ct. 244, 28 L. Ed. 768 (1884); Minnesota Mining & Mfg. Co. v. Polychrome Corp., 267 F. 2d 772 (7th Cir. 1959)."

Without further prolonging this Petition for Writ of Certiorari we refer this Honorable Court to the reading of that case so as to show that the petitioners herein were entitled to bring this suit in the Court where jurisdiction could be obtained over General Motors and Chrysler as well.

The above two cases clearly in point with the fact situation here and being *by this Honorable Court should not have been repudiated by the Fifth Circuit* whose duty it is to strictly observe, adhere to and follow the law as laid down by this the highest Court in our land and hence certiorari without hearing should be granted.

An additional case holding that mandamus was not a proper remedy in this type situation by this Court which the 5th Circuit has violated is the case of Bankers Life & Casualty Company v. Honorable John W. Holland, 98 L. Ed. 107, 346 U.S. 379, and is another compelling reason why writ of certiorari should be granted in this case under the decisions of this Court in the Holland case supra.

This court said:

> "The petitioner, an Illinois corporation, brought a treble damage action in the District Court for the Southern District of Florida, alleging a conspiracy to injure its business in violation of the anti-trust acts, and naming as defendants, in addition to residents of the Southern District of Florida the insurance commissioner of Georgia, who was personally served in the Northern District of Florida, but resided in Georgia.
>
> "In order to meet the requirements of § 4 of the Clayton Act (15 U.S.C. § 15), which allows suit in any district court in the district in which the defendant 'resides or is found or has an agent,' petitioner pro-

ceeded on the theory that co-conspirators are each others' agents, and that the commissioner therefore was 'found' and had 'agents' in the district of suit. The trial court, however, after holding that it had jurisdiction of the action and of the commissioner, held that venue was not properly laid, and, pursuant to 28 U.S.C. § 1406 (a), ordered the action as to the commissioner served and transferred to the Northern District of Georgia. Petitioner then sought a writ of mandamus from the Court of Appeals to compel the trial judge to vacate the order of severance and transfer. The court of Appeals dismissed the petition on the ground that mandamus was not an appropriate remedy.

"Five members of the Supreme Court, in an opinion by Clark, J., affirmed on the ground that the writ of mandamus did not lie to correct a merely erroneous decision of an inferior court, *as long as it did not involve a clear abuse of discretion or usurpation of judicial power.*"

Where we ask was the abuse of discretion? Where petitioner asks was the usurpation of judicial power? Petitioners submit that abuse and usurpation of judicial power occurs when Federal statutes are nullified and when Judge Suttle refused to act and entered a stay order contrary to the Blaski and Kerotest opinions and the Federal Rules and Statutes. The Fifth Circuit opinion in this case amounts to judicial abdication in which the Circuit Court refuses to follow their duty of following the decisions of the Supreme Court construing the statutes involved herein. This is such a serious matter that certiorari without further hearing save the action of this Court should be granted.

The writ of mandamus does not lie in this type of case where the trial court had the discretionary power to determine whether venue had been established and whether the

Plea of Forum Non Conveniens had been waived. Hence, the Fifth Circuit erred in holding contra.

The converse of what the 5th Circuit did is the true rule of law. A writ should issue against a trial court such as Judge Suttle who issues a stay order when it is the court's duty to *rule on said pleas under the established statutes and rules of civil* procedure, supra, not to mention the common law rules *concerning the duty of a court to rule and to act in conformity with Federal Statutes, Rules and decisions.*

It is quite apparent that trial judges no longer have any discretion as to these matters if the Circuit Court opinion in this case as to causes that have been assigned by the original trial judge, to the court against which mandamus is sought stands. Insofar as Trial Courts and litigants are concerned, appeals will be thus abolished and mandamus becomes the remedy and the Appellate Court will make findings of fact by means of the application for writ of mandamus and thus invade the legislative intent of Congress and the Supreme Court of the United States decisions pertaining to jurisdiction and mandamus, thus destroying the right of trial judges as well as the right of litigants to proceed to trial without first having the appellate court determine whether jurisdiction, venue and forum non conveniens applies or whether a stay order is appropriate.

This appears to be an invasion of all of the well settled rules of this and other courts and represents such a departure from time honored and established precedents of

this and other courts that a petition for certiorari should be granted by this Honorable Court as prayed for herein.

Briefly stated, the opinion in this case may be summarized as saying that the Fifth Circuit for the first time in the jurisprudence of America has held that the Court which first acquired jurisdiction *should surrender its rights by virtue of a stay order to a Court in which the Petitioners brought suit for declaratory judgment eleven days thereafter and to which under Title 28—140(a) governing the doctrine of forum non conveniens this cause could not be transferred because it could not have originally have been brought in Kansas.*

This was done upon the theory that a *stay order could be used as a substitute for the statutory remedy provided under the terms of Rule 1404(a)* and *insofar as we know, no other court in the United States has ever so held.*

Certainly, Justice Cardozo said nothing in the *Landis case*, 299 U.S. 248, that would give the Fifth Circuit this power. *Landis*, supra, *held that it had to be an emergency creating a judicial scandal before this remedy should be used.* The Landis case dealt with stay orders not issued is violation of Federal Rules, Federal Statutes and Supreme Court decisions.

For this and many other reasons, this case is such a departure from elementary and well settled law, as well as the decisions of this Court and the *Supreme Court of the United States that it is a case calling for the immediate granting of this writ of ceriorari before the legal world be-*

comes completely bewildered and before Hecht loses his day in court.

The Fifth Circuit in *Ex Parte Blaski*, 245 F. 2d 737, in which the able, eminent and conscientious Judge Rives, author of the opinion in the case at bar participated, held that the Court could take such matters of convenience into consideration in cases where it would be *in the interest of justice to so do but the Supreme Court as heretofore stated reversed this holding in 4 L. Ed. 2d 1254, holding that Congress meant what it said and that the courts could not bring it in any other district court than Congress had provided.*

The doctrine of forum non conveniens, it is respectfully submitted, cannot be applied to a stay order *so as to do indirectly what the Supreme Court of the United States held in Blaski, supra, cannot be done directly upon the theory that it would be wise for the purposes of the administration of justice and thus render the Federal statutes set out hereinabove mere wastepaper and make of Congress a stooge for the Courts and this is particularly true where the highest Court in our land has laid down clear decisions upholding the rights claimed by petitioners herein and hence certiorari without hearing should be granted.*

As a matter of fact, if this case is permitted to stand, *the legal world will be thrown into a state of judicial chaos, overburdened district judges (and this court will take judicial notice there are many) will stay the proceedings in many cases wherein they have jurisdiction to a court in a foreign jurisdiction where many defendants will file motions*

for declaratory judgment in such foreign jurisdictions so as to impose undue delay, expense and inconvenience to plaintiffs.

In this respect let the Court note that probably the greatest amount of infringement involved in this case was committed in the Western District of Texas where the petitioner does business in such a way that there was a definite legal ground for *giving respondents the right to select their forum at a place where A.C.F. the other two defendants could be tried.*

In this case the record reflects that *there has been a change of circumstances* in that this case is now ripe for trial as to all defendants and the mere fact that plaintiff in a patent suit has to try the issue of validity first and thereafter have a trial on the issue of damages does not justify the Court of Appeals in saying that the stay order was valid and thus have piece-meal litigation in two states with different circuits and declaratory judgments in foreign states can mess up the calendars of the federal district courts of the United States for many years to come, as well as the rights of litigants under *sacred and time honored statutes.*

Certainly the Court of Appeals should not claim that under the *Landis case,* supra, that *the interest of justice is so acute that this kind of practice should now be inaugurated for the first time.*

The cases relied upon by the Court of Appeals in its opinion do not so hold.

In the *Blaski case* the Supreme Court of the United States said "*this would not occur again,*" *but the Judge that said that did not realize the ingenuity of lawyers and judges.*

Any other holding would cause *Rule 1404 (a)* and the statutes quoted, *Title 28, 1400 (a) and (b)* to be mere nullities subject to the whims and caprices of our courts. *Our statutes and Congress would become meaningless and no lawyer or litigant would know where to proceed.*

The Supreme Court of the United States in Blaski and Kerotest, supra, has said plainly this cannot be done, the Supreme Court so stated *with great clarity and logic.* We therefore think that if these cases are now to be overruled this should be done by this Court and not by a lower court.

We, therefore, respectfully submit that this Court should hastily undo this dangerous opinion insofar as the rights of litigants particularly petitioner herein and insofar as the protection and enforcement of statutes and rules of civil procedure are concerned to litigants that are to follow are concerned.

Judical encroachment upon the legislative branch of our Government should be *avoided by* the correction of this opinion and by the granting of this petition for certiorari without further hearing save this application and the action of this court thereon. A learned United States District Judge has been abused and the rights of petitioners have been flagrantly violated by this opinion. Justice insofar as petitioners herein are concerned has been too long delayed without cause or justification.

The opinion of the Court of Appeals as written is a clear *invasion of the constitutional rights of the litigants in this case and of the powers delegated to Congress under the Constitution.*

In *Tokio Marine & Fire Ins. Co. v. Aetna Cas. & Surety Co.*, 322 F. 2d 113, cited in the opinion of the Circuit Court of Appeals, the now Chief Justice of the 5th Circuit Court of Appeals, Justice John R. Brown, quoted Justice Story as follows: "It is for the public interest and policy to make an end to litigation * * * so that "* * * suits may not be immortal, while men are mortal,". In that case Justice Brown permitted the Texas Court in which *the litigation had first begun to proceed.*

That is what we are asking for here, rather than a piecemeal trial in Kansas and a suit against two other defendants and ACF in Texas. See *Kerotest Mfg. Co. v. C-O-Two*, 96 L. Ed. 200; *Sunstrand Corporation v. American Brake Shoe Co.*, 315 F. 2d 273.

We base our conclusion that this is the first time in American Jurisprudence that this has been declared to be the law in part upon the quotation from the *Sunstrand case*, supra, as follows:

> "While the fact situations in Kerotest and the instant case are not exactly parallel, *it is to be noted that in Kerotest, the final disposition permitted the first filed suit to proceed.* Moreover, in each of the cases, referred to by the Court in its footnote (fn. 3 at 184, 72 S. Ct. at 211) *it was the prosecution of a subsequently filed suit that we sought to be enjoined or stayed.*"

We respectfully submit that it is therefore quite apparent that this writ of mandamus should be dissolved by the

granting of this petition for certiorari without further hearing save the action of this Honorable Court.

The right of the petitioners here to bring this suit in the El Paso District where complete relief could be had against all defendants is well demonstrated by the following cases and Rule 13(a).

In the case of *Link-Belt Co. v. Dorr Co.*, 15 Fed. Supp. 663, the action taken by Judge Guinn is approved:

> "Congress has provided that patent owners may bring suit for infringement in the District Courts of the United States 'in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business.' Jud. Code § 48, 28 U.S.C.A. § 109. *The present motion seeks to deprive Dorr of this statutory right.* It is clear that the Federal Declaratory Judgments Act (Jud. Code § 274d, 28 U.S.C.A. § 400) does not deprive a patent owner of his right to sue in the district of which a defendant is an inhabitant."

Under Rule 13-A of the Federal Rules of Civil Procedure Judge Guinn entered the only order that could be entered in this case. The order of Judge Suttle was and is void.

Judge Guinn had jurisdiction to enter this order protecting the jurisdiction of his Court since the claim involved herein involves the same transaction or occurrence that is the subject matter of the defendants' claim and motion for summary judgment pending in the United States District Court at Wichita, Kansas.

Rule 13(a), Federal Rules of Civil Procedure, provides as follows:

> "(a) Compulsory Counter claims. A pleading shall state as a counterclaim any claim which at the time

> of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13."

The factors to be considered under Rule 13(a) in determining whether the defendants' claim against the plaintiff is a compulsory counterclaim are:

(1) Does it arise out of the transaction or occurrence that is the subject matter of the defendants' claim?

(2) Does it require for its adjudication the presence of third parties of whom this court cannot acquire jurisdiction?

(3) Was Hecht's action pending when the defendants' action in Kansas was commenced?

Considering these factors, *Rule 3, Federal Rules of Civil Procedure,* provides:

> "A civil action is commenced by filing a complaint with the Court."

The filing of the complaint commences the action under this rule and for the purposes of *Rule 13(a), Federal Rules of Civil Procedure. 1 Barron & Holtzoff, Federal Practice,* 630-631.

Under the express wording of Rule 13(a), it is the time of the commencement of defendant's action and not the date of service of process that governs the filing of a compulsory counterclaim. An argument that the date of service is the controlling date under Rule 13(a) was rejected in *Coates v. Ellis*, 61 A. 2d 28, 30 (Mun. Ct. App. D.C. 1948), where the court said:

> "As we understand appellant's argument he does not question that his claim would ordinarily be the subject of a compulsory counterclaim; but he says that Rule 13 (a) does not apply to this situation because it provides 'that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.' And he argues that the District Court action though filed March 4, 1948, had not been 'commenced' when he filed this suit in the Municipal Court eight days later, because process in the District Court had not been served upon him and that by the time such process was served he had already filed his Municipal Court action and such action was then 'the subject of a pending action' and hence not a compulsory counterclaim in the District Court action.
>
> "The argument must fail. Rule 13 (a) itself says that such counterclaim shall be compulsory unless it was the subject of a pending action *at the time the original action was commenced.* It is clear beyond question that the District Court action has been 'commenced' eight days before this action was filed in the Municipal Court. It is quite well settled that an action is 'commenced' by the filing of the complaint."

In *United States v. Szerlip*, 169 F. Supp. 529, 530 (E.D.N.Y. 1959), the court stated:

> "* * * The defendant is in error as to the time when the action was commenced because he is of the opinion that the action was not commenced until a copy of the

> complaint was served upon him on April 4, 1955. In fact the action was commenced on March 14, 1955 by the filing of the complaint in the office of the Clerk of this Court. Rule 3, Federal Rules of Civil Procedure, 28, U.S.C.A."

With respect to factor (2) above, it is clear that the adjudication of Hecht's claim against the defendants requires only the presence of the defendants, all of whom are subject to the jurisdiction of this Court.

With respect to factor (1) above, the defendants asserted claim against Hecht arises out of the transaction or occurrence that is the subject matter of Hecht's claim.

In Moore's Manual, Federal Practice and Procedure, 706 (1962), it is stated:

> "Courts should give the phrase 'transaction or occurrence that is the subject matter' of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits. Subject to the exceptions, any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim. This works no hardship upon parties or counsel, since although in the unusual case it may not be clear that the claim is compulsory, subdivision (b) permits it to be pleaded, and hence there is no penalty for such action. Furthermore, subdivision (f) protects against oversight inadvertence, or excusable neglect."

The court, in *Williams v. Robbins*, 1 F.R.D. 211, 213 (D.C. 1940), in discussing the term "transaction or occurrence" stated:

> "* * * It seems apt to say that the words 'transaction' and 'occurrence' as used in Rule 13(a) include the facts and circumstances out of which a cause of action may arise; *Scarborough v. Smith*, 18 Kan. 399. The words 'transaction' and 'occurrence' probably mean

> whatever may be done by one person which affects another's rights and out of which a cause of action may arise. Whether the subject matter of opposing claims is the same requires an examination into the basic facts underlying each of them. A familiar test may be applied by inquiring whether the same evidence will support or refute the opposing claims."

In *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926), the court stated a test of "logical relationship" for determining whether claims arise out of the same transaction or occurrence under Rule 13(a), saying:

> "Transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

The Court of Appeals for the Third Circuit applied this test in *Great Lakes Rubber Corp. v. Herbert Cooper Co. Inc.*, 286 F. 2d 631, 634 (3rd Cir. 1961):

> "The phrase 'logical relationship' is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. *Where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties,* fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action. *Indeed the doctrine of res judicata compels the counterclaimant to assert his claim in the same suit for it would be barred if asserted separately, subsequently.*"

In discussing the liberal view given the word "transaction" in *Moore v. New York Cotton Exchange*, supra, the court in *Princess Fair Blouse, Inc. v. Viking Sprinkler Co.*, 186 F. Supp. 1, 4 (M.D.M.C. 1960), noted that this view is firmly established:

> "This liberal view is now well established. It is the test that has been determined the 'one compelling test of compulsoriness.' *Rosenthall v. Fowler*, D.C.N.Y. 1952, 12 F.R.D. 388, 391. It is generally accepted that the term 'transaction or occurrence' io to be given a liberal construction, and is not to be used in any narrow or restricted sense, and the counterclaim is compulsory if there is any logical relation between the plaintiff's claim and the counterclaim. 1A Barron and Holtzoff, Federal Practice and Procedure, Sec. 394. * * * Courts should give the phrase "transaction or occurrence that is the subject matter" of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits.' 3 Moore's Federal Practice, Sec. 13.13 (2d Ed. 1948). *Courts, having acquired jurisdiction of a cause for any purpose, should dispose of the entire controversy and not leave any part of it unsettled. Arizona Lead Mines v. Sullivan Mining Co.*, D.C. Idaho 1943, 3 F.R.D. 135. *'The adjustment of defendant's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the courts' time, and injustice.' Chicago & N.W. Ry. Co. v. Lindell*, 1929, 281 U.S. 14, 50 S. Ct. 200, 201, 74 L. Ed. 670."

Moore's Federal Practice, Vol. 3, page 38, together with the Advisory Committee Note of 1946, and the footnote thereto, seem to settle this question as follows:

> "Suppose P had sued A in the federal court, and that thereafter, but before answering, A commenced

suit against P in either a state or federal court. Under the Rule as originally drafted, it was doubtful whether or not A was required to assert his claim as a compulsory counterclaim in P's federal action. The 1946 amendment to subdivision (a) eliminated the ambiguity and made it clear that the exception applies only if at the time the federal action was commenced A's claim was the subject of a pending action. *The possibility of a contrary construction was regarded as undesirable since it would permit a party having a claim which would be the subject of a compulsory counterclaim to avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the original federal action.*"

"If A commences action in a federal court before P institutes his proposed federal action, multiple litigation should not be countenanced. Rule 13 applies in all federal courts and P should counterclaim in A's action. If P, in addition to counterclaiming, institutes a federal action A should be able to have it abated, certainly where both actions are pending in the same federal court, *and at least have P's action stayed if brought in another federal court.*"

The Circuit Court of Appeals for the 5th Circuit and all other courts have long followed the general rule that the court first acquiring the jurisdiction of a controversy should be allowed to proceed without interference from other courts under suits subsequently instituted. *Carbide & Carbon Chemicals Corporation v. United States Industrial Chemicals, Inc.*, 140 F. 2d 47 (4th Cir. 1944); *In Re Georgia Power Co.*, 89 F. 2d 218 (5th Cir., 1937).

Petitioners would show that the circumstances had changed since the original entry of the order, since depositions had been taken all over the United States which could be used at the time of trial and since it is pointed out in the original brief of the Petitioners here respondents in the lower court that the case was ready for trial in Pecos in May, 1967, on the merits and the Court had no discretion under *Landis*, supra, except to permit Judge Guinn to act as suggested by Justice Cardozo in the *Landis case*, 299 U.S. 458. We quote from *Landis*, supra, as follows:

> "To bring about a fitting correspondence between rulings and realities, there must be a new appraisal of the facts by the court whose function it is to exercise discretion, and an appraisal in the light of the situation existing and developed at the time of the hearing." 299 U.S. at p. 258.

This is particularly true where Mr. Pugsley, attorney for General Motors, admitted in his argument before Judge Guinn that General Motors might be held liable as an original infringer by virtue of the Rochester valve. (R. 719). Petitioners have the right to dispose of this case in one trial, in one forum as to all Defendants including the Respondent A.C.F.

WHEREFORE, your Petitioner respectfully prays this Honorable Court to grant the Petition for Writ of Certiorari to the end that on review the Circuit Court may be directed to reverse its judgment and that this Court should affirm

the Judgment of the United States District Court in and for the Western District of Texas, El Paso Division.

Respectfully submitted,

JOHN J. WATTS,
P. O. Box 1031,
Odessa, Texas,

C. E. KEYS,
P. O. Box 1378,
Monahans, Texas,

and

JOHN G. PATTERSON,
711 Fannin Street,
Houston, Texas,

By: Gerald S. Sugg
Attorneys for Petitioners.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Petition for Certiorari has been furnished counsel for Respondents: Mr. William J. Barnes and Mr. John O. Tramontine, 227 Park Avenue, New York, New York; Mr. John Grambling, Third Floor, El Paso Natural Gas Company Building, El Paso, Texas; and Mr. Mikel Stout, 600 Fourth National Bank Building, Wichita, Kansas, by placing a copy of same in the United States Mail, postage paid, Certified Mail, Return Receipt Requested on this 27 day of December, A.D. 1967.

Jerald S. Sugg